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Manitoba (Minister of Finance) et al
Cited as: 2013 MBQB 109
(Winnipeg Centre)

# COURT OF QUEEN'S BENCH OF MANITOBA

**B E T W E E N:**

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|---|---|---|
| MANITOBA JOCKEY CLUB INC., applicant, | ) | Appearances: |
| - and - | ) | Jeffrey R. W. Rath and David Khan for the applicant |
| THE GOVERNMENT OF MANITOBA, STAN STRUTHERS, MINISTER OF FINANCE FOR THE GOVERNMENT OF MANITOBA, THE MANITOBA LOTTERIES CORPORATION, a Crown Corporation appointed under the *Criminal Code of Canada* and created pursuant to *The Manitoba Lotteries Corporation Act of Manitoba*, C.C.S.M., c. L210, and THE HORSE RACING COMMISSION, created under *The Horse Racing Commission Act* of Manitoba, C.C.S.M., c. H90, respondents. | ) | Denis G. Guénette and Sean D. Boyd for the respondents The Government of Manitoba, Stan Struthers, Minister of Finance for the Government of Manitoba and The Manitoba Lotteries Corporation |
| | ) | No appearance on behalf of The Horse Racing Commission |
| | ) | JUDGMENT DELIVERED: May 6, 2013 |

**DEWAR J.**

[1] Manitoba Jockey Club Inc. (hereinafter "MJC") has commenced this application for judicial review seeking a number of types of relief and claims that Mr. Stan Struthers, the Minister of Finance for the Province of Manitoba

(hereinafter the "Minister") has improperly made a reviewable decision to curtail funding to MJC.

[2] MJC owns and operates a racetrack on the western portion of the City of Winnipeg called Assiniboia Downs. It has done so historically with at least the indirect assistance of the government. The assistance has come primarily in three ways.

[3] The first method of financial assistance has been provided by the province through monies generated from the use by patrons of video lottery terminals ("VLTs") which have been placed at Assiniboia Downs by the Manitoba Lotteries Corporation ("MLC"). Pursuant to an agreement signed April 30, 2011, currently in force between MLC and MJC (the "MLC/MJC Agreement"), there is a formula which dictates the distribution of revenues generated by VLTs placed at Assiniboia Downs. Without getting into detail, the first $6.5 million of revenues generated in a calendar year are paid to MJC, the next $2.17 million is paid to MLC, and any amount thereafter is split 20%-80% in favour of MLC. There are other more minor grant provisions also included in the Agreement. Evidence was led before me that the proceeds paid to MJC in calendar year 2012 totalled $6,425,161.80. In providing these funds, MLC is paying monies to MJC which, at least in part, might otherwise be paid by MLC to the province pursuant to ***The Manitoba Lotteries Corporation Act***, C.C.S.M., c. L210.

[4] The second method of financial support received by MJC involves the payment of monies out of the Pari-Mutuel Levy Fund, a fund established for the

promotion of horse racing in Manitoba pursuant to the provisions of ***The Pari-Mutuel Levy Act***, C.C.S.M., c. P12.

[5] There is a third method of financing which involves revenues received from simulcast operations in Winnipeg casinos. However, there is no evidentiary support respecting this revenue source in the application, and I will say nothing more about it.

[6] On or about January 30, 2013, the Minister wrote to MJC and advised:

> The Province of Manitoba will be tabling its 2013 Budget this spring, which will include significant measures to reduce provincial expenditures. Impacts on the Assiniboia Downs were unfortunately reported in the media today in advance of our formal communication with your organization this week.
>
> In 2011/12, the Province of Manitoba provided the Assiniboia Downs and thoroughbred racing with approximately $9.5 million through VLT grants, rebate of the par-mutuel *(sic)* levy and the provision of simulcast revenues from the two Winnipeg casinos. This level funding cannot be sustained in these uncertain economic times.
>
> The 2013 budget will reduce overall funding to the Assiniboia Downs which we understand will require significant adaptation for your organization. However, we have been approached by the Red River Exhibition Association with a plan to own and operate the Downs and achieve savings to the tax payer of almost $5 million a year. They are also prepared to make much needed capital improvements in the facility.
>
> The Red River Exhibition Association has a strong financial track record and is committed to advancing rural and agricultural development. We encourage you to work with them to come to an agreement in advance of the provincial budget. Their plan ensures the continuation of horse racing at the Downs and long-term sustainability for the facility.
>
> Like many other Provinces in Canada, we believe that horse racing must make adjustments to rely less heavily on public funding and provincial gaming revenues. We believe there is an opportunity to achieve that in Manitoba and I offer provincial staff to provide any support in that regard as we move forward.
>
> Sincerely,
> Stan Struthers
> Minister

[7] MJC considers itself betrayed by the province as a result of the statements described in this letter and the implication that there has been discussion between the Minister and Red River Exhibition Association ("RREX") about RREX's desire to take over, or participate in, the operation of Assiniboia Downs. Of particular concern is that MJC considered that it was in the course of negotiating a long-term contract with MLC, presumably with a view to arranging a perpetuation of funding through the proceeds of the gambling revenues. In particular, MJC points to clause 22.05 of the MLC/MJC Agreement, which reads:

> 22.05 The parties acknowledge that they intend, in good faith and on a timely basis, to negotiate a long term agreement. Until such time as the parties finalize a long term agreement, the terms and conditions of this Agreement shall continue to apply. Without limiting the generality of the previous sentence, the Corporation shall pay the commission and make an Annual Grant by reference to the calculation provided for in Sections 4 and 5 for each calendar year, following December 31, 2011, until a long term Agreement is finalized.

[8] MJC contends that notwithstanding efforts made by them since the signing of the MLC/MJC Agreement to explore opportunities that would contribute to the long-term viability of its Assiniboia Downs facility, the decision by the Minister to move in a different direction with another organization (which MJC maintains is its competitor) utilizing what is now MJC's facility, is contrary to the commitment set out in clause 22.05 of the MLC/MJC Agreement. MJC says it has not been given the opportunity to sit down with MLC or the Minister to negotiate a long-term arrangement. Furthermore, it suspects improprieties behind the scenes between the Minister and RREX and is further outraged because the government has not responded to what MJC considers to be

legitimate questions posed to the Minister following the letter of January 30 and meetings with the Minister.

[9] In addition, MJC is aggrieved by the failure of the Minister to approve the plan of distribution respecting the Pari-Mutuel Levy Fund put forward by the Horse Racing Commission ("HRC") on December 15, 2012 for the fiscal year April 1, 2013 to March 31, 2014. Although the plan recommends that a significant portion of the Pari-Mutuel Levy Fund be paid to MJC in the way of purse support, the Minister has not approved the plan.

[10] MJC is now faced with the challenge of operating a racetrack without the funding that it says is necessary for its existence. In the case of the Pari-Mutuel Levy Fund, that funding has currently been discontinued by virtue of the Minister's failure to approve the recommendation of the HRC, and in the case of the VLTs, that funding will soon be discontinued, or at least significantly reduced.

[11] It therefore argues that the decision made by the Minister to discontinue the funding as conveyed in the Minister's letter of January 30 and in a meeting of February 28, 2013, is a reviewable decision and MJC requests a range of relief that extends from certiorari through to prohibition, mandamus, and declarations.

[12] MJC submits that the Minister's decision to discontinue funding was based upon irrelevant considerations, failure to permit a hearing before the decision was made and that consultations which are suspected by MJC to have occurred between the Minister and RREX have been improper, if not illegal. It also submits that the Minister is obliged to accept the HRC proposal respecting the

allocation of the Pari-Mutuel Levy Fund for the 2013/14 fiscal year. It requests that the court intervene.

[13] Counsel for the Minister (who is also counsel for the province and MLC) maintains that as regards the VLT revenues, no decision has yet been made which is capable of court involvement. Furthermore, as regards the distribution of the Pari-Mutuel Levy Fund, counsel argues that the Minister has the discretion whether to approve the HRC plan of distribution and is not bound by any timeframes in which to do so.

**DECISION**

[14] It appears that the two sources of funding, namely the VLT revenues and the Pari-Mutuel Levy Fund are the sources at issue in this case. The rights of MJC, such as they are, to each of these sources of funding arise in two distinct ways. As regards the VLT revenues, whatever rights exist must come from the MLC/MJC Agreement. As regards the Pari-Mutuel Levy Fund, whatever rights exist must come from ***The Pari-Mutuel Levy Act***.

[15] I propose to deal with each source of funding individually.

**VLT Revenues**

[16] I start by saying that it is not the function of the court to tell government how it must spend its money. That is strictly the task of the legislature whose members are elected by the public at large. One of the functions of a government is to allocate government revenues, oftentimes scarce, amongst those who are seeking to receive a part of them. It is trite to say that the

demand from those who seek to receive a part of government revenues invariably exceeds the supply, so the government is inevitably and consistently obliged to make hard decisions. Our democracy is based on the premise that the legislature elected by the people is best placed amongst all of our institutions to make those hard decisions. That is certainly not the function of an unelected judiciary.

[17] However, governments are not immune from judicial oversight. Governments, and ministers, cannot do anything they please. They cannot pass laws which are unconstitutional, either in the sense of encroaching upon the jurisdiction of another level of government, or in the sense that a law offends the requirements of the ***Charter***. Furthermore, where statutes delegate to ministers and others the duty or power to make decisions that directly affect the rights of citizens, as a general rule, they must make those decisions in a manner that respects the existence of those rights and there are a range of remedies available to the courts to supervise the fair exercise of such powers and duties. The orders of certiorari, prohibition, and mandamus are all such remedies.

[18] Generally speaking, decisions which relate to the expansion of its revenue base or the allocation of government resources (sometimes known as government spending) are decisions which are not susceptible to judicial interference. Those are political decisions for which the government will either profit by or pay for at the next election.

[19] Government ministers generally do not impose taxes or spend money unless they are authorized to do so. That means that if a minister of the

government decides that the government should or should not support a particular initiative, the articulation of that support or lack thereof is not a decision until formal steps are taken which authorize or implement that decision. In the case of a taxation or spending power, the decision can only become judiciable when it is exercised, not just contemplated, and only in those cases when it is clear that a citizen's rights have been abused or the decision has exceeded the government's, or minister's, jurisdiction.

[20] What exists here? On January 30, 2013, the Minister wrote a letter to MJC that gave notice that he was trying to arrange a reduction in "provincial expenditures", including funding to MJC. Given the wording of ***The Pari-Mutuel Levy Act***, one might fairly question whether a payment out of the Pari-Mutuel Levy Fund is a provincial expenditure, but in my view there is no question that granting a share of VLT revenues by MLC to MJC, rather than paying them in whole or in part into the Consolidated Fund, would qualify as a provincial expenditure.

[21] MJC submits that at least insofar as VLT revenues are concerned, the Minister could not take any steps to reduce that funding because, by so doing, he would be in violation of clause 22.05 of the MLC/MJC Agreement.

[22] Counsel for Manitoba, MLC and the Minister submits that those parties acknowledge the existence of the MLC/MJC Agreement and of its binding nature, at least upon MLC. However, he argues that the Minister intends to place before the legislature a bill which, once passed, will authorize MLC (and presumably the government) to avoid some or all of its current obligations arising from the

Agreement. So, for example, if the Agreement requires the continued placement of the VLTs at Assiniboia Downs and the payment of 100% of the revenues from those terminals to MJC up to $6,500,000, the government intends to pass an Act of the legislature to free MLC and the government from those obligations. However, until that occurs (or presumably until some other termination provision in the Agreement is triggered), the funding provided in that Agreement continues.

[23] The question therefore is whether the decision by the Minister to take steps to secure a way out from that Agreement is a decision which is capable of challenge by way of certiorari. I do not consider that any decision has been made by the Minister which falls within the kind of decision which attracts certiorari. Certiorari is available to restrict a minister's public law duty or power. The obligation, if any, owing to MJC in respect of VLT revenues is at best a private law duty, arising from the MLC/MJC Agreement. Certiorari does not arise to enforce a private law duty. In that regard, see ***Judicial Review of Administrative Action in Canada***, by Donald J. Brown and the Honourable John Evans, which states, at section 1:1200:

> ... the defining characteristic of certiorari, prohibition, and mandamus is that they are available only in respect of a breach of a duty imposed by public law.

[24] Furthermore, the letter of January 30 and the subsequent discussions can, in the context of this case and the VLT revenues, be considered strictly as a statement of the province's intention. The province agrees that the MLC/MJC Agreement governs the division of VLT revenues as between MLC and MJC so

long as the Agreement subsists or an Act of the legislature is passed which authorizes MLC or the province to avoid its contractual obligations. A statement of intention is not a decision that attracts judicial review.

[25] Nor for that matter would an order of prohibition be appropriate. To suggest otherwise would be to conclude that a minister would never be entitled to put before the legislature any bill which purports to disclaim a government contract. That conclusion is contrary to the principle that the legislature can pass any law that it wants so long as it has jurisdiction and the law does not contravene the ***Charter***. Simply because statutes which disclaim contracts are few and far between does not mean they are illegal. Such statutes can be the subject of intense judicial scrutiny, but that in itself does not render them illegal. (See ***Wells v. Newfoundland***, [1999] 3 S.C.R. 199). Since the legislature has the jurisdiction to pass such an Act, I see no reason why a minister who decides to place a bill before the legislature for it to consider cannot do so. In the meantime, the status quo remains. None of the rights, if any, of MJC have been trampled until the bill is passed. In this case, the status quo is the MLC/MJC Agreement which remains in force unless it is otherwise terminated.

[26] Counsel for MJC has relied upon the case of ***Byl (Litigation guardian of) v. Ontario*** (2003), 67 O.R. (3d) 588, [2003] O.J. No. 3436 (Sup.Ct.J.) (QL), in support of its argument that there exists jurisdiction in this court to set aside the Minister's decision to curtail funding to MJC. MJC also submits that there is jurisdiction that would enable this court to require the Minister to continue the funding as it currently exists.

[27] However, the ***Byl*** case deals with a different fact situation and a different legal framework. Firstly, in ***Byl***, the province not only terminated a funding agreement with an association that ran a community centre for mentally challenged patients, it gave control of its assets to another association, one who appeared to be more supportive of the government's policies. The applicant in that case sought to reacquire control of its assets and the funding which had been discontinued. In coming to its decision, the court found that the province had assumed control of the assets of that applicant without an order-in-council that was required by the governing legislation. In that case, the province had acted illegally and the takeover could not be sustained. The decision to restore the funding in that case appears to have been secondary to the decision to give control of the assets back to the applicant, but necessarily incidental to it. Had funding not been restored, the lives of a number of mentally challenged residents would have been significantly and detrimentally affected since the government would have given control back to the applicant who had no ability to finance its operations without those funds.

[28] It is noteworthy that in ***Byl***, the court said the following, at paras. 88-9:

> 88 It is common ground that there are no alternative facilities in the area in which to house the persons housed in the SCACL premises. No doubt the possibility of such a situation arising is the reason for the existence of section 13. The act of the Ministry in terminating the funding for SCACL is, in reality, necessarily accompanied by the seizure of the SCACL premises, otherwise the patients cannot be maintained. It is, therefore, artificial to divide the decision into two: one to cease funding, and the other, to seize the assets. It is one decision and, without the order in council, it is an illegal decision.

> 89 Therefore, it is not necessary for us to consider the legality of the decision to cease funding, as if it stood alone. It does not stand along *(sic)*, and it is irrelevant whether it would be legal on its own.
>
> [emphasis added]

[29] In the case at bar, the court is faced with a different situation. The government has not wrestled control of Assiniboia Downs from MJC. The applicant's case at best simply involves judicial review of a standalone decision to cease funding. The ***Byl*** case does not decide that issue.

[30] Additionally, whereas in ***Byl*** the province had acted to curtail the funding and had wrestled control from the applicant, here the province has only signified its intention to change the funding. Today, the VLT funding still exists. This is a very different situation. MJC still has time to lobby legislators and ask them to take its position to the floor of the Legislative Assembly. The court cannot presume that the expressed intention of the Minister will necessarily make its way into legislation, notwithstanding the doubts expressed by MJC of any other outcome. This court must provide the legislature with the opportunity to fully consider any bill put before it. Although perhaps unusual, it is not beyond reason that the legislature may refuse to accept any bill proposed by a determined minister, or even amend it to provide some relief to the doomsday scenario being painted by MJC.

[31] There is a big difference between a case in which a minister acts under a power given to him by some authority and thereby affects a person's interests and a case in which a minister requests legislative authority to act in a particular

way. In the former case, prerogative remedies may be available. In the latter case, they are not.

[32] The bottom line is that I do not feel bound by the result that was achieved in ***Byl***.

[33] Further, in its brief, MJC has raised the doctrine of "legitimate expectations" as briefly talked about in the case of ***Hayes v. British Columbia (Minister of Labour)***, 2000 BCSC 1665. MJC claims that by reason of clause 22.05 of the MLC/MJC Agreement, it had a legitimate expectation that the government would not curtail any funding without first engaging in negotiations with MJC. In my view, clause 22.05 has nothing to do with the Pari-Mutuel Levy Fund, about which I will speak later. As regards the VLT revenue, the doctrine of legitimate expectations is academic.

[34] Given that I have found that a minister is entitled to lay a bill before the legislature that changes the government's course in either taxation or spending, including legislation that authorizes a breach of a government contract, a party cannot have an enforceable legitimate expectation that a minister would never attempt to avoid a contractual commitment through legislative action. In such a situation, a party may be disappointed, perhaps even frustrated by or suspicious of the change in course, but that does not give rise to a legal remedy.

[35] Further, the legitimate expectations claimed by MJC arise out of contract with MLC and/or the government. If they are capable of enforcement at all, they are to be enforced under a cause of action in contract, not through an application for a certiorari, mandamus or prohibition. Any duty arising out of a

contract is a private law duty, not a public law duty. We are not concerned here with a cause of action framed in contract. Indeed, the process of prosecuting such a cause of action involves a completely different procedure and generally will involve *viva voce* evidence and a trial rather than the summary process adopted here. Furthermore, styling some of the grounds for relief as requests for a declaration does not advance the argument. *Court of Queen's Bench Rule* 14.05(3) states:

> **Injunction, declaration, receiver**
> 14.05(3) Where the relief claimed in a proceeding includes an injunction, declaration or the appointment of a receiver, the proceedings shall be commenced by action; but the court may also grant such relief where it is ancillary to relief claimed in a proceeding properly commenced by application.
>
> [emphasis added]

[36] When it is acknowledged that certiorari, prohibition and mandamus are not available in respect of the complaints concerning the VLTs, the declarations requested in the notice of application are not ancillary to anything and are more properly articulated in a statement of claim. If allegations of breach of private law duties are to be raised by MJC, the government respondents are entitled to defend themselves in a process in which there are pleadings, full discovery and *viva voce* evidence. I do not say that there is or is not merit to MJC's complaints. I only say that this is not the forum in which they should be resolved.

[37] I might add that allegations of criminal misconduct respecting a minister of the Crown such as have been made in this case require the more intense procedure commenced by statement of claim. I have given little credence to

those allegations as they exist here. They are irrelevant to the real issues that are before me.

[38] Counsel for MJC argues that I should draw a number of adverse inferences against the respondents because they have not filed evidence directly challenging the insinuations made by MJC in its affidavit materials that there has been a conspiracy between the respondents and RREX to take over Assiniboia Downs or that confidential information has been improperly disclosed to RREX, or that the Minister has acted unfairly, even inappropriately. Although it would have been interesting to have evidence from the government parties attesting to whatever facts they have, if any, to defend these insinuations, there was no obligation as regards the VLT issue to put that evidence into the record at this stage. The government respondents were content to argue that judicial review was not an available remedy, and were under no obligation to go any further than that.

[39] In his responding brief, counsel for MJC raises the notion of "Honour of the Crown", a notion that emanates recently from a decision of the Supreme Court of Canada in ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2013 SCC 14. In what circumstances this notion is intended to have application is not fully clear in that decision, but I am content to say it is not applicable to the case at bar. As indicated earlier, the case of ***Wells v. Newfoundland***, *supra*, is a complete answer to whether a government can legislate itself out of a contract.

[40] I therefore dismiss all of the claims for relief by MJC as they pertain to the VLT revenues.

**Allocation of the Pari-Mutuel Levy Fund**

[41] What then of the funding historically provided through the allocation of the Pari-Mutuel Levy Fund?

[42] Prior to April 1, 1997, there existed a statute called ***The Pari-Mutuel Tax Act***, R.S.M. 1987, c. P12. In that Act, a tax was charged on every bet placed at non-exempt racetracks. As of April 1, 1997, the province ceased collecting the money as a tax. Rather, it legislated the creation of the Pari-Mutuel Fund, and designated the monies collected by the racetrack operation as a levy.

[43] Revenues into the Fund are supplied from a percentage of the bets placed through a racetrack operator during the year. The revenues are remitted upon collection by the operator to the HRC. Even if the operator does not collect the funds, it is obliged by law to remit the funds which it ought to have collected.

[44] The HRC is mandated by ***The Pari-Mutuel Levy Act*** to propose an allocation of the monies in the fund for the next fiscal year, namely April 1 to March 31. The plan of distribution respecting a fiscal year must be submitted to the minister before December 31 of the preceding year, unless the date is extended by the minister. ***The Pari-Mutuel Levy Act*** provides for an approval of the plan by the minister designated by the Lieutenant Governor in Council. If the plan of distribution is approved by the minister, the plan can then be made

public by the HRC and the monies disbursed in accordance with the approved plan of distribution.

[45] ***The Pari-Mutuel Levy Act*** however is silent as to what is to happen if the minister does not approve of the plan of distribution. There is no provision which contemplates that eventuality. There is a provision for the HRC to adopt an amendment to an approved plan of distribution which the minister may then approve, but this does not appear to deal with the situation where the plan has never been approved in the first place (s. 15(4)).

[46] There appears to be no authority for the HRC to distribute the Fund without the approval of the minister (s. 16).

[47] What is noteworthy is that while there is a timeframe by which the HRC must submit its plan of distribution each year, there is no timeframe specified by which the minister must decide whether to approve the proposed plan.

[48] Evidence is before me that the HRC has proposed an allocation of the Pari-Mutuel Levy Fund for the fiscal year 2013/2014 which provides for the same treatment as occurred in the fiscal year 2012/2013. That proposal included a significant grant to MJC for use in purse support.

[49] Counsel for the respondents argue that since there is no timeframe mandated by ***The Pari-Mutuel Levy Act*** during which the Minister must decide whether or not to approve the plan of distribution, there is no obligation on the Minister to decide one way or the other by a particular date. Furthermore, since the Minister is contemplating a reduction of funding to MJC through the

introduction of amending legislation, it is open to him to drag his decision at least until the date the amending legislation is passed.

[50] With respect, I do not agree. I recognize that ***The Pari-Mutuel Levy Act*** requires the approval of the minister, and that it does not provide any definite guidelines to the minister as to the considerations which he should employ in coming to his decision whether or not to approve a plan of distribution. Presumably, the main criterion is that the Fund should be allocated in a manner that best promotes horse racing in Manitoba. That is apparent from s. 13(1) which states:

> 13(1) The Pari-Mutuel Levy Fund is hereby established for the promotion of horse racing in Manitoba to be distributed in accordance with a plan of distribution approved by the minister under section 15.
>
> [emphasis added]

[51] What is also significant is s. 34 of ***The Pari-Mutuel Levy Act***, which states:

> 34 Levies that are paid or payable to an operator or are collected and remitted or to be collected and remitted to the commission are not public moneys within the meaning of *The Financial Administration Act*.

[52] Therefore, the fund does not consist of monies which would normally be regarded as government revenues, even though a part of every bet placed must be paid, by operation of law, into the Pari-Mutuel Levy Fund. The imposition of the levy is the government's way of supporting the horse racing industry. However, these monies are not to be considered as a government grant in the traditional sense of the words. Indeed, as matters stand, the province has no proprietary interest in these monies.

[53] MJC submits that the Minister can be compelled to approve the plan put forward by HRC for fiscal year 2013/14, and requests the court to make an order accordingly. The Minister argues that he is under no obligation to approve the plan as of this date.

[54] On this issue, I find in favour of MJC. I do so on the following basis.

[55] Implicit in ***The Pari-Mutuel Levy Act*** is the notion that the Minister will make a decision about the HRC proposal before the commencement of the next fiscal year. I say this because ***The Pari-Mutuel Levy Act*** states:

> **Plan for distribution of Fund**
> 15(1) The commission shall, before December 31 of a year,
> (a) adopt a plan for the distribution of all or part of the Fund for the following fiscal year; and
> (b) submit it to the minister.

[56] Clearly the Act requires HRC to make its recommendation by December 31st of a calendar year because the plan of distribution is to be effective for "the following fiscal year", a defined term which means April 1 to March 31. Therefore, read in context, the plan is intended to at least be considered by April 1st of each year. In my opinion, the Minister is not entitled to drag the decision. I look for some assistance in resolving the lacuna in the legislation by reviewing the approach taken in the prior year. There, the HRC provided its proposal on November 26, 2010 and it was approved by the Minister on January 30, 2012. There was no evidence before me to suggest that the timing for any prior year resulted in a ministerial approval after April 1st.

[57] To suggest that the Minister should address the HRC's recommendation before April 1st makes eminent sense when the ***The Pari-Mutuel Levy Act*** is

considered in context. Although a non-profit corporation, MJC essentially operates a business. Prior knowledge of a funding source is important to any business. How is a business to operate if it only knows mid-way through the year whether a significant portion of its funding is going to be provided, especially where the funding is a major source of its revenues? I recognize that there may be other facilities in the province who might wish to participate in the Pari-Mutuel Levy Fund, but no doubt they too would be interested in a funding commitment before, rather than after, obligations are incurred. The failure of a minister to decide by March 31 would be unfair to those who are seeking the financial support especially when they are providing a service consistent with the objectives of legislation, namely the promotion of horse racing within Manitoba.

[58] Even the approval provided by the Minister for last year is consistent with this objective. The proposal written by HRC for the last fiscal year and replicated for the April 1, 2013 – March 31, 2014 fiscal year contains prospective language which suggests that it affects monies which are yet to be distributed (and perhaps yet to be collected). For this new fiscal year it reads:

> During the period April 1, 2013 to March 31, 2014, the Pari-Mutuel Levy Fund will be distributed as follows:
>
> (1) When an amount deposited to the Pari-Mutuel Levy Fund is related to a bet which depends on the selection of not more than two horses, 5.75/6.50 of the amount will be distributed, in trust to The Manitoba Jockey Club Inc., the operator of Assiniboia Downs, for the Horsemen's Benevolent and Protective Association's thoroughbred purse support program ...
>
> (2) When an amount deposited to the Pari-Mutuel Levy Fund is related to a bet which depends on the selection of three or more horses, 8.25/11.50 of the amount will be

> distributed, in trust, to The Manitoba Jockey Club Inc., the operator of Assiniboia Downs, for the Horsemen's Benevolent and Protective Association's thoroughbred purse support program ...
>
> (3) Levy funds collected will be held by the Manitoba Horse Racing Commission in trust bank accounts and in accordance with the Act any interest or income earned will be distributed ...

[59] The requirement that a plan of distribution is provided by HRC before December 31st of each year is to ensure that the kind of funding available to the industry is known before the start of the next fiscal year.

[60] In my view, the fact that there has been no approval of the HRC plan of distribution for the 2013-2014 fiscal year can either be considered as a decision by the Minister to reject the plan, or a failure on the part of the Minister to make a decision. In either case, the Minister would need to be motivated by legally permissible considerations. If the considerations are not appropriate, in the case of a decision to reject the plan, certiorari may lie to provide redress. In the case of a non-decision, mandamus may lie.

[61] The failure of the Minister to approve the HRC proposal appears to be dictated by his desire to change ***The Pari-Mutuel Levy Act*** in some way. I was referred to tab 31 of the province's brief which includes the Minister's comments made during the 2013 Manitoba Budget Address. At that time, he said:

> This year, we will reduce public subsidies to horse racing and direct resources to priority services through legislative changes to *The Pari-Mutuel Levy Act* and the Manitoba Jockey Club VLT site holder agreement.

[62] That may well be an objective, but as was argued before me by counsel for the Crown during his submissions regarding the VLTs, the status quo ought to remain until the amending legislation is enacted. Just as the status quo for the VLTs is the MLC/MJC Agreement, the status quo for the Pari-Mutuel Levy Fund is ***The Pari-Mutuel Levy Act***. That statute requires the Minister to approve of the HRC proposal in a timely way using considerations that promote the horse racing industry in Manitoba. A consideration which is based upon an intention to reduce the availability of non-public money for the horse racing industry can hardly be termed as promoting horse racing in Manitoba and is not consistent with the Minister's obligations as they are now articulated under Act. Those obligations may very well change once the Act is amended but until then the Minister must act in accordance with the law as it now stands. In my respectful opinion, he has not done that, notwithstanding his right through legislative action to change the course of government support for horse racing in the future.

[63] Therefore, under the circumstances, I am of the view that the Minister has utilized an improper and irrelevant consideration upon his receipt of the proposal put forward by HRC, and by so doing, the Minister has made a reviewable decision or has lost his opportunity to at least consider the plan of distribution within the timeframe contemplated by the legislation. The time has expired and under the circumstances and in the face of a void in the legislation, the court is entitled to make a decision that fills that void.

[64] No reason other than it is the Minister's intention to change the legislation has been presented to discredit the HRC proposal. The only suggested allocation that currently exists is that set out by the HRC, the body established by the government to regulate horse racing in Manitoba.

[65] Counsel for the Crown submits that I cannot order the Minister to approve the proposal because ***The Pari-Mutuel Levy Act*** gives him a wide discretion to approve a suggested allocation. I am not so persuaded in this case. No evidence was provided by the Crown on this application that suggests that the Minister had any reason to deny or drag his approval other than he was proposing a change in ***The Pari-Mutuel Levy Act***. On the basis of the evidentiary record before me, I can only assume that there was no other reason and in that regard, there really was no alternative available to the Minister. Although one can theorize of a number of ways that money could be spent to promote horse racing in Manitoba, no actual alternatives were put before the court. Indeed, there was no attempt during the hearing to describe what the Minister intends other than follow through on his intention to "reduce public subsidies to horse racing and direct resources to priority services through legislative changes". The logical conclusion to be drawn from this language is that money is going to be taken from the horse racing community and utilized for some other government purpose. As indicated above, that is contrary to the purpose of the Pari-Mutuel Levy Fund as expressed in ***The Pari-Mutuel Levy Act*** as it now stands.

[66] Put another way, it appears that the Minister does not want to lose control of the money accumulating in the Pari-Mutuel Levy Fund until he fashions a statute that fits his agenda. In my view, although he has every right to change course as to whether, and if so, how and at what level, the province should provide support to the horse racing industry, he cannot defer a decision necessary for the financial support of people in the horse racing industry while he is in the process of trying to obtain the authorities necessary to effect a change. This is especially the case where as here we are dealing with a fund which does not consist of public money.

[67] I therefore grant an order compelling the Minister to forthwith approve the plan of distribution provided by HRC for the fiscal year 2013-14. I make no comment on the ability of the legislature to undo or amend the effect of this order through the contemplated legislative process, but at least pending any legislative changes, ***The Pari-Mutuel Levy Act*** funding should continue.

[68] I have dismissed all of the rest of MJC's application. The allegations in this proceeding which relate more properly to causes of action in contract or in tort have not been adjudicated in this decision, and without commenting on the merits, if any, on such causes of action, this decision does not foreclose MJC from making those claims in contract or in tort through the issuance of a statement of claim in the normal way.

[69] The parties may speak to costs if not otherwise agreed.

J.